Supreme Court, U.S.
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No. 92-1444

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

CARNELL BATES and DARNELL BATES,
Petitioners,

v.

PAMELA K. WITHROW, WARDEN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. KELLEY
ATTORNEY GENERAL

THOMAS L. CASEY
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

PETER L. TREZISE
Assistant Attorney General
Attorneys for Respondent

QUESTION PRESENTED

WHERE PETITIONERS WERE AWARE OF ALL THE HISTORICAL FACTS UNDERLYING THEIR CURRENT CLAIM OF INEFFECTIVE ASSISTANCE OF STATE COURT TRIAL COUNSEL BUT FAILED TO INFORM THEIR RETAINED HABEAS COUNSEL AND FAILED TO RAISE IT AS A GROUND FOR RELIEF IN THEIR FIRST HABEAS CORPUS PETITION, AND WHERE THE GROUND WAS SUBSEQUENTLY RAISED AND REJECTED IN STATE COURT POST-TRIAL PROCEEDINGS AND THEY NOW ATTEMPT TO RAISE IT IN A SECOND HABEAS CORPUS PROCEEDING, HAVE THEY DEMONSTRATED SUFFICIENT "CAUSE" AND "ACTUAL PREJUDICE" TO PREVENT DISMISSAL OF THE SECOND PETITION AS AN ABUSE OF THE WRIT?

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JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered December 18, 1992, affirming the judgment of dismissal entered by the United States District Court for the Eastern District of Michigan which had been entered March 31, 1992. A timely motion for rehearing and suggestion for rehearing en banc was denied by Order filed February 9, 1993. The District Court case was brought under 28 USC § 2254, a Petition for Writ of Habeas Corpus on behalf of a person in custody pursuant to a state conviction. The Petition for Writ of Habeas Corpus was dismissed by the District Court as an Abuse of the Writ.

Jurisdiction of this Court is invoked by Petitioner under 28 USC § 1254(1).

STATEMENT OF THE CASE

The Statement of the Case in the Petition for Writ of Certiorari adequately outlines the procedural history of the case and is accepted by Respondent as accurate. Petitioners' factual recitation is also fairly accurate with the following corrections and additions.

Petitioners state on page nine of their brief that a stipulation was agreed to by the prosecutor and Petitioners prior to the state court evidentiary hearing that the prosecutor had tendered a plea bargain offer to trial counsel which proposed that Petitioners plead guilty to second degree murder in exchange for a recommended sentence of ten years to twenty years. In truth, the stipulation was only that the prose-

cutor had tendered the plea offer to second degree murder and felony firearm in exchange for a recommendation of a minimum sentence of ten years. The prosecutor did not stipulate that the plea include any maximum sentence recommendation. A second degree murder conviction may result in imprisonment for any term of years up to life in prison. Further, a sentence recommendation from the prosecutor is not binding on the court. Petitioners testified that Mr. Elliot, their trial counsel, had advised them after trial of a plea offer of ten to twenty years. Since no court had determined that the Petitioners were denied effective assistance of counsel, no factual determination of the actual plea bargain offer has been made.

Further, at the evidentiary hearing in state court Darnell Bates testified that at the time he was advised of the plea offer by trial counsel, counsel also advised him that trial counsel would be able to get the plea offer back on appeal. Darnell Bates repeated this testimony on cross examination. In spite of these assurances by trial counsel that the plea offer could be recovered on appeal, Darnell Bates never advised appellate counsel of the failure of trial counsel to relay the plea offer to him prior to trial. Further, the two Petitioners discussed this matter following their conviction and concluded that they would "get it on appeal".

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTIONS OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

In this habeas corpus proceeding, Petitioners allege that they were denied the effective assistance of trial counsel through the failure of trial counsel to advise them of a plea bargain offer prior to their trial and conviction of first degree murder in the Michigan state courts. The Petition for Writ of Habeas Corpus is the second filed by Petitioners. The first habeas petition was denied on the merits by United States District Court for the Eastern District on Michigan on January 28, 1988. Petitioners were denied a certi-

ficate of probable cause on March 31, 1989. The within petition was dismissed as an abuse of the writ by on April 6, 1992. The Sixth Circuit upheld the dismissal by Opinion of December 18, 1992. Respondent asserts that this Court's decision in McCleskey v Zant, 499 US ___; 111 S Ct 1454; 113 L Ed 2d 517 (1991), governs in this case. Petitioners have raised no compelling argument to ignore the requirements imposed in McCleskey requiring Petitioners to demonstrate "cause" and "prejudice" to avoid dismissal of the petition as an abuse of the writ.

In McCleskey v Zant, 113 L Ed 2d at 534-540, Justice Kennedy, writing for the majority of the Court, outlined the history of the abuse of the writ doc-

trine. Following a discussion of the case law and legislative history of the doctrine, Justice Kennedy concluded:

> Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. Sanders [v United States, 373 US 1 (1963)] cited a passage in Townsend v Sain, 372 US at 317, which applied the principle of inexcusable neglect, and noted that this principle also governs in the abuse of the writ context, Sanders v United States, 373 US at 18.
>
> 113 L Ed 2d at 541.

Justice Kennedy stated, "[o]ur recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate

choice." McCleskey, 113 L Ed at 541-542. The Court then, adopting the standard imposed in procedural default cases, ruled that in order to avoid dismissal of a subsequent petition raising new issues, the petitioner must show "cause" for the failure to raise the claim earlier and "actual prejudice" resulting from the failure. 113 L Ed 2d at 542. The courts below held that the substance of the ineffective assistance of counsel claim was reasonably available to Petitioners at the time of their earlier petition and that they had not shown cause for failure to raise the claim in that petition.

Petitioners put forth three arguments in support of the petition for writ of certiorari. First, Petitioners

argue that the cause and prejudice standard of McCleskey should not apply in their case because the state courts addressed the merits of the claim and did not invoke state procedural rules prohibiting review. Putting aside for the moment whether there were state procedural rules which foreclosed review of the issues, Petitioners ignore that the abuse of the writ doctrine is a federal procedural rule designed to avoid repetitive habeas petitions with the accompanying costs resulting in the federal courts. Second, Petitioners argue that, while the facts of trial counsel's failure to advise them of the plea offer was known at the time of the initial petition, the legal significance was unknown to Petitioners. The argument continues that this lack of legal knowl-

edge constitutes "cause" for the failure to raise the claim in the initial petition since the legal basis of the claim was not reasonably available to Petitioners and, therefore, to counsel. Petitioners are arguing for a lesser standard of cause to be applied where a petitioner has the means to retain counsel as opposed to the petitioner who must proceed pro se. Ignorance of the law will not constitute cause excusing the failure of a pro se petitioner to raise a claim in an earlier petition. Rodriguez v Maynard, 948 F2d 684, 688 (10th Cir, 1991). To allow ignorance of the legal importance of known facts to constitute cause for a represented petitioner and not for one proceeding pro se, would violate basic considerations of equal protection based on the finan-

cial ability to retain counsel. Third, Petitioners argue that the failure of trial counsel to advise them of the legal significance of his failure to communicate the plea offer constituted ineffective assistance of counsel, itself, and constitutes cause. The factual basis for this argument is contradicted by Petitioners' testimony at the state evidentiary hearing where Darnell Bates indicated that trial counsel advised them that the plea bargain could be restored on appeal. Even had counsel failed to advise Petitioners of the appellate importance of the claim, the factual basis of the claim was available, the issue was not novel, and reasonable investigation would have revealed the importance of the issue. The failure of Petitioners to raise the

claim in the first petition due to ignorance does not amount to cause.

The legal principles involved in evaluating an abuse of the writ defense are stated clearly and completely in McCleskey. Petitioners do not challenge these principles; they challenge only the conclusions reached by the lower courts after application of those principles to the unique facts of this case. The arguments raised are very much dependent on the unique facts of the within case and do not raise important, unsettled questions of federal law.

Petitioners do not identify, nor can Respondent, any conflicts among the Circuits of the United States Courts of Appeal with regard to any of the issues raised by Petitioners.

A. THE STATE COURTS DID NOT WAIVE ANY PROCEDURAL RULES IN REVIEWING PETITIONERS' CLAIM SUBSEQUENT TO THE FIRST HABEAS PETITION, AND EVEN IF THERE WAS SUCH A WAIVER, THE PETITIONERS MUST DEMONSTRATE CAUSE AND PREJUDICE TO AVOID DISMISSAL OF THEIR SECOND HABEAS PETITION AS AN ABUSE OF THE WRIT.

Petitioners' first argument rests on an assertion that the state courts waived a valid state procedural bar and allowed Petitioners to raise their ineffective assistance of counsel claim in a post-conviction proceeding. Petitioners argue that this state "waiver" makes the decision on McCleskey v Zant, 499 US ___; 111 S Ct 1454; 113 L Ed 2d 517 (1991), inapplicable. Petitioners urge that since the state was not interested in "finality" that the federal court should not be concerned with finality and should waive its rules pertaining to abuse of the writ.

Respondent asserts that, at the time Petitioners brought their delayed motion for a new trial in the state courts, the Michigan courts had no procedural rule prohibiting the filing of a delayed motion for new trial following appeal of right and raising new issues.[1] At the time pertinent herein, state law allowed a delayed motion for new trial to be filed in the trial court at any time on leave granted by the court. People v

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[1]Since the Petitioners' delayed motion for new trial filed in 1988, the Michigan Supreme Court has adopted new rules of procedure covering all post-conviction proceedings. The new rules direct all motions for relief from judgment to the trial court and limit the presentation of issues which could have been raised in an appeal of right absent a showing of cause and prejudice. These rules were adopted effective October 1, 1989 and did not apply to the within case. Michigan Court Rules Section 6.500, et seq.

Parker, 393 Mich 531, 541 (1975). A trial court had the inherent power to grant leave to file a delayed motion for a new trial in any case that was heard before him. Attorney General v Recorder's Court Judge, 341 Mich 461, 472 (1954). A delayed motion for new trial is addressed to the sound discretion of the trial court. Id., at 472. Further, the Michigan Supreme Court has never held that the number of appeals in a criminal case is limited or that relief cannot be granted on an issue raised in an appeal subsequent to the first appeal. See, e.g., People v Hutchinson, 415 Mich 854 (1982); People v Paulea, 138 Mich App 430 (1983), lv den, 422 Mich 928 (1985). Even this Court has noted that Michigan does not have a rule of finality. Anderson v

Harless, 459 US 4, 8 (1982). It is true that the prosecutor argued to both the trial court and the Court of Appeals that consideration of Petitioners' ineffective assistance of counsel claim was waived under the decision of People v Brady, 139 Mich App 688 (1984), and that a doctrine of finality should apply. Petitioners argued vehemently that Brady was bad law with no precedential effect. The Michigan case law clearly indicates that a delayed motion for new trial was entertainable by the trial court at the exercise of its discretion. There was no procedural rule prohibiting such review which was waived by the courts in this case. Therefore, Petitioners' argument that such a waiver of valid procedural rule should operate as a waiver of the cause and prejudice analysis in an

abuse of the writ situation has no factual basis for support. The argument is without merit.

Furthermore, even had the state courts waived a procedural rule to review the merits of Petitioners' claim, it does not follow that the cause and prejudice standard would be inapplicable in a federal habeas case involving abuse of the writ. Respondent asserts that this argument is a non sequitur. The principle that a federal court will not invoke a state procedural rule to avoid habeas review where the state courts have not enforced such rule is well established where the state is asserting the procedural rule itself to avoid habeas review. Francis County Court of Ulster County v Allen, 442 US 140

(1979); Melchior v Jago, 723 F2d 486, 490-91 (6th Cir, 1983). The doctrine of procedural default is a recognition that the states have a legitimate interest in maintaining a semblance of "procedural regularity" binding on a petitioner. McCleskey, 113 L Ed 2d at 542. Concerns of comity and federalism dictate that a federal court will accord state procedural rules recognition in federal reviews. Where the state courts have waived the procedural bars, there is no compelling interest in the federal courts to apply state procedural bars.

However, in the case of abuse of the writ, the state is not asserting that a state procedural bar, waived by the state courts, should be applied by the federal court to prohibit habeas review.

Abuse of the writ is a federal procedural bar. The state is asserting that review of the petition is barred by this federal procedural limitation. While abuse of the writ aims at some of the same purposes as a state procedural bar, there are important federal considerations for the imposition of the abuse of the writ doctrine beyond considerations of comity with the states. As noted in McCleskey,

> Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes.
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> * * *
>
> Far more severe are the disruptions when a claim is presented for the first time in a second or subsequent habeas petition.
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> * * *
>
> If re-examination of a conviction in the first round of federal habeas stretches resources, examination of

> new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action.
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> Id., L Ed 2d at 543.

The federal courts obviously have an interest in preventing repetitive petitions. The drain on scarce judicial resources is compounded every time a petitioner is allowed to present a new petition for writ of habeas corpus in a situation where the claim could have been presented in an earlier petition allowing the court to address all claims in a single proceeding. This federal court interest is not related to whether the state courts allow post-conviction proceedings in alleged contravention of valid state procedural rules. The drain

on federal judicial resources is the result of piecemeal litigation represented by multiple petitions in the federal courts. To accept Petitioners' argument would place the control over the federal habeas docket in the hands of the state courts and allow repetitive, abusive petitions whenever a state court, for whatever reason, waived or failed to affirmatively apply a state procedural rule. Petitioners cite no federal authority to support a federal court waiver of abuse of the writ based upon a state court's willingness to waive a state procedural default.

Finality is an important consideration in the area of collateral review. But finality means more than just finality with regard to the conviction.

Finality necessarily involves a determination that, at some point, litigation must cease, both federal and state.

Respondent asserts that whether the state courts waived a valid state procedural bar is immaterial when considering the issue of abuse of the writ. The only correct inquiry concerns whether Petitioners have shown "cause" and "prejudice" which will excuse their failure to comply with the federal procedural requirements as to abuse of the writ.

B. THE FACTUAL BASIS FOR THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS KNOWN TO PETITIONERS AT THE TIME OF THE FIRST HABEAS PETITION AND THE ALLEGED LACK OF KNOWLEDGE OF THE LEGAL SIGNIFICANCE OF THOSE FACTS DOES NOT CONSTITUTE CAUSE.

Petitioners argue that, while the facts of trial counsel's failure to

advise them of the plea offer was known at the time of the initial petition, the legal significance was unknown to Petitioners. The argument continues that this lack of legal knowledge constitutes "cause" for the failure to raise the claim in the initial petition since the legal basis of the claim was not reasonably available to Petitioners and, therefore, to counsel. However, Petitioners' testimony at the state evidentiary hearing shows that trial counsel told them that they could regain the benefit of the plea offer on appeal. They were, thus, informed of the significance of this issue prior to the appeal of right in state court. While Petitioners may not have known the legal fine points of ineffective assistance of counsel, they clearly were aware that

the plea offer was an appellate issue. Nevertheless, Petitioners never advised appellate counsel of the plea offer until after the appeal of right and the first habeas petition. The failure of Petitioners to advise appellate or habeas counsel of this matter does not constitute cause.

In McCleskey, this Court explained what a petitioner must show to demonstrate cause to avoid dismissal on grounds of abuse of the writ:

> ... the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel efforts" to raise the claim in state court Murray v Carrier, 477 US at 488, 91 L Ed 2d 397, 106 S Ct 2639. Objective factors that constitute cause include "'interference by officials'" that makes compliance with the state's procedural rule impracticable, ...
>
> 113 L Ed 2d at 544.

Petitioners have shown no objective external factor which prevented counsel from raising the claim of ineffective assistance of counsel in the first habeas petition. Only their own failure to advise counsel of the uncommunicated plea offer prevented counsel from raising the claim.

Petitioners argue that the "legal" facts were not reasonably available to them because they did not have the legal knowledge of the potential constitutional claim. It is noteworthy that at the Sixth Circuit, Petitioners acknowledged that, had they proceeded pro se in their first petition, the lack of legal knowledge would prevent them from establishing cause for the failure to raise the within issue in the first petition.

Rodriguez v Maynard, supra. Petitioners conceded that a pro se petitioner would be held to the same standard of investigation and presentation of all issues as would an attorney, and lack of education and legal knowledge would not excuse failure to raise the issue in the earlier petition. In this Court, Petitioners argue that petitioners who retain counsel to press a habeas petition should be allowed to claim ignorance of the law to establish an external cause excusing their failure to inform retained counsel of the facts at the time of the first petition. If ignorance of the legal importance of factual matters does not constitute cause for pro se petitioners, it should not constitute cause for petitioners represented by counsel. Such a distinction

would violate basic considerations of equal protection based on ability to retain counsel. Petitioners have shown no impediment created external to themselves which prevented them from informing their counsel of the factual basis for the within claim. Petitioners have not demonstrated cause excusing the failure to raise the within claim in their first habeas petition.

Petitioners' reliance on Reed v Ross, 468 US 1 (1984), is misplaced. Reed held that cause may be demonstrated when the "constitutional claim is so novel that its legal basis is not reasonably available to counsel." Id., at page 16 (emphasis added). The Reed Court established an objective test to determine whether the legal basis was

reasonably unavailable to counsel based on an analysis of prior case law and practice. The individual awareness of counsel, or petitioner, was not a factor in a determination of whether the legal basis was reasonably available. The legal basis for Petitioners' claim was not novel at the time of the conviction or at the time of the first habeas petition. See, e.g., United States ex rel Caruso v Zelinsky, 689 F2d 435 (3rd Cir, 1982); Wright v Estelle, 572 F2d 1071 (5th Cir, 1978); Boykin v Alabama, 395 US 238 (1969). Counsel admits that at the moment that he became aware of the failure of trial counsel to communicate the plea offer, he immediately recognized the constitutional significance. Presumably, had the facts been related to counsel prior to direct appeal, the

significance would have been equally apparent. Certainly, at the time of the first petition, the legal significance would have been apparent to counsel. Counsel cites no cases which were decided after conviction or initial habeas petition which changed the constitutional standards as applicable to the facts in this case. The legal claim was not novel. Petitioners have not demonstrated cause excusing the abuse of the writ.

C. PETITIONERS CANNOT ESTABLISH CAUSE EXCUSING THEIR FAILURE TO RAISE THE WITHIN CLAIM IN THEIR FIRST HABEAS PETITION BASED UPON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioners argue that the failure of trial counsel to advise them of the legal significance of his failure to communicate the plea offer constituted

ineffective assistance of counsel, itself, and constitutes cause. This argument merely steps back one step from the claim of personal lack of legal knowledge to assess the blame for that lack on trial counsel. This argument is contradicted by the testimony of the Petitioners at the evidentiary hearing in state court where Darnell Bates stated that trial counsel advised them they could regain the plea bargain on appeal and that he had discussed the opportunity to restore the plea offer in the appeal with Carnell Bates. Trial counsel, thereby, did advise Petitioners of the appellate importance of the issue. Petitioners could have told appellate counsel of the failure to communicate the plea offer and did not. The failure to apprise appellate counsel

of the claim rests at the feet of Petitioners, not trial counsel.

In addition, it must be pointed out that, while ineffective assistance of counsel may serve as cause excusing a procedural default or abuse of writ, the ineffective assistance of counsel must first be raised in the state courts and exhausted pursuant to 28 USC §§ 2254(b) and (c). Murray v Carrier, 477 US 478, 488-489 (1986). Petitioners did not argue to the state courts nor to the federal district court that the failure of trial counsel to advise them of his constitutionally deficient performance, itself constituted ineffective assistance of counsel. Petitioners must first exhaust this argument in the state courts before presenting it to the federal courts.

Finally, this argument again attempts to establish cause based on the lack of legal understanding of Petitioners. It fails to recognize that Petitioners were advised of the failure of counsel to timely communicate the plea bargain to them at the time the jury rendered its verdict and before the appeal of right in the state courts. Thus, the factual basis for the claim was not only reasonably, but actually available to Petitioners well before the first habeas petition. Everything necessary to raise the within claim was within the personal knowledge or, through reasonable investigation, could have been obtained by Petitioners. The facts were available and the legal issue was not novel. The claim was reasonably available to Petitioners when they were

advised of trial counsel's failure to communicate the plea. Petitioners have not demonstrated that the failure to raise the within claim in their first habeas petition was caused by ineffective assistance of counsel.

RELIEF

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Peter L. Trezise
Assistant-In-Charge
Habeas Corpus Division

Attorneys for Respondent

April 2, 1993